

Foo Fatt Chuen v Jacobson Cheong Weng Hin & Ors

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS
NO D-24NCC-440 OF 2010
MOHAMAD ARIFF J
29 JUNE 2011

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Bankruptcy — Capacity of bankrupt — Undischarged bankrupt — Non-declaration of bankruptcy status — Agreements entered into by undischarged bankrupt — Effect of bankruptcy laws on agreements — Whether agreements void — Whether plaintiff knew of first defendant's bankruptcy status before agreements were executed — Bankruptcy Act 1967 ss 38(1)(d) & (e)

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In 2008, Jacobson Cheong Weng Hin ('the first defendant') was introduced to Foo Fatt Chuen ('the plaintiff'), the founder of a group of companies known as the Axis Identity Group of Companies, as a serious businessman who had undertaken international development projects. Sometime in 2009, the first defendant approached the plaintiff and proposed that they enter into a joint venture on an international scale. The plaintiff agreed to collaborate on the joint venture and both of them apparently identified Axis Identity Group International Sdn Bhd ('the sixth defendant'). On 16 November 2009, the plaintiff and the first defendant entered into a memorandum of agreement ('the first agreement') to develop certain pieces of land in Papua New Guinea ('PNG') into large housing development projects and the onward sale of housing units to the Housing Board Corporation of Papua New Guinea. The first agreement was followed by the supplementary agreement dated 13 January 2010 ('the second agreement') between the plaintiff and the first defendant, which specifically identified Axis Global Capital Bhd ('the fifth defendant'), a company which held 57% of the shares in the sixth defendant, as the corporate vehicle through which the first defendant's interests were to be represented. This second agreement also referred to the land development projects in PNG ('the PNG projects') to be undertaken by the plaintiff and the first defendant. In addition the first defendant and the sixth defendant also executed an assignment agreement ('the third agreement') dated 13 January 2010. Foo Lai Yoke ('the fourth defendant'), the first defendant's ex-wife held 20% of the shares in the sixth defendant while Chan Kuai Yong ('the fifth defendant'), who was on record as having the same address as the first defendant, held 89% of the shares in the fifth defendant. Disputes then arose between the parties, with the plaintiff blaming the first defendant for his failure to bring in the financial support but instead financially bleeding the Axis subsidiaries. According to the plaintiff the PNG projects had not materialised and the first defendant through his nominees had assumed majority control of the Axis subsidiaries without any cash outlay. The plaintiff brought the present suit against the defendants

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- A when he allegedly discovered that the first defendant was at all material times an undischarged bankrupt. It was the plaintiff's case that as a result of this discovery, the first defendant and his nominees did not have any enforceable rights under the relevant agreements. The first defendant denied the plaintiff's allegations and maintained that the plaintiff knew of the first defendant's
- B bankruptcy status before the parties entered into the three agreements. The plaintiff submitted that to allow the agreements by the first defendant, an undischarged bankrupt to stand would be to condone agreements whose consideration was unlawful as something forbidden by the Bankruptcy Act. The plaintiff thus argued that since the agreements did not have the prior
- C permission of the Director-General Of Insolvency ('DGI'), they were void and that s 66 of the Contracts Act would then apply and the 'advantage' received by the first defendant and his nominees would have to be restored to the plaintiff. In reply the first defendant contended that he was not appointed director of any of the relevant companies, ie the fifth, sixth and seventh defendants, and
- D there was no entry or carrying on of any business by the first defendant, either alone or in partnership. As such the first defendant contended that there was no evidence of any purported breach of s 38(1)(d) and (e) of the Bankruptcy Act 1967 ('the Act').
- E **Held**, allowing the plaintiff's claim with costs to be taxed and paid by the first, third and fourth defendants to the plaintiff:
- (1) On the facts of this case, there was sufficient evidence to establish elements of an entering into, or carrying on of a business by the very
- F terms of the relevant agreements. It was plain that the legislative intent of s 38(1)(d) of the Act was not to condone any act of the undischarged bankrupt in relation to the entry into or the carrying on of a business, or in relation to directly or indirectly taking part in the management of a company unless he had the prior permission of the DGI. A similar
- G reasoning should apply in relation to the effects of the prohibition under s 38(1)(e) of the Act. Thus, although this court was not sitting as a bankruptcy court nevertheless it was held that since there had been a breach of s 38(1)(d) of the Act this court could not ignore the legal effects of illegality on the agreements (see para 51).
- H (2) As to whether the plaintiff knew of the bankruptcy status, this court could only conclude on the evidence that the plaintiff's version of the facts was more probable. The plaintiff was observed as being more candid, truthful and consistent in his testimony than the first defendant, who appeared more evasive and guarded. Although demeanour by itself
- I would not be a safe guide to test the truth, based on the entirety of the evidence and the available contemporaneous documents it was found that the plaintiff knew of and confirmed the first defendant's bankruptcy status only much later. As such when the three agreements were executed the plaintiff had not been told by the first defendant that he was an

undischarged bankrupt. Further the fifth defendant's solicitors were not aware of the first defendant's status until informed in December 2010, and the fifth defendant was an important corporate vehicle for the first defendant (see paras 52–53 & 55).

[Bahasa Malaysia summary]

Pada tahun 2008, Jacobson Cheong Weng Hin ('defendan pertama') diperkenalkan kepada Foo Fatt Chuen ('plaintif'), pengasas kumpulan syarikat dikenali sebagai Axis Identity Group of Companies, seorang ahli perniagaan yang serius yang telah menerima projek-projek pembangunan antarabangsa. Pada sekitar 2009, defendan pertama bertemu dengan plaintif dan mencadangkan bahawa mereka memasuki satu usaha sama dalam skala antarabangsa. Plaintif bersetuju untuk bekerjasama dalam usaha sama tersebut dan kedua-dua mereka secara jelas mengenalpasti Axis Identity Group International Sdn Bhd ('defendan keenam'). Pada 16 November 2009, plaintif dan defendan pertama memasuki satu memorandum perjanjian ('perjanjian pertama') untuk membangunkan tanah tertentu di Papua New Guinea ('PNG') kepada projek pembangunan perumahan yang besar dan jualan seterusnya unit-unit rumah tersebut kepada Housing Board Corporation of Papua New Guinea. Perjanjian pertama diikuti oleh satu perjanjian tambahan bertarikh 13 Januari 2010 ('perjanjian kedua') antara plaintif dan defendan pertama, yang secara khusus mengenalpasti Axis Global Capital Bhd ('defendan kelima'), sebuah syarikat yang memegang 57% saham dalam defendan keenam, sebagai alat syarikat yang melaluinya kepentingan defendan pertama diwakili. Perjanjian kedua ini juga merujuk kepada pembangunan projek tanah di PNG ('projek-projek PNG') untuk diterima oleh plaintif dan defendan pertama. Tambahan defendan pertama dan defendan keenam juga memeterai satu perjanjian peletakhakkan ('perjanjian ketiga') bertarikh 13 Januari 2010. Foo Lai Yoke ('defendan keempat'), dan bekas isteri defendan pertama memegang 20% saham di dalam defendan keempat sementara Chan Kuai Yong ('defendan kelima') yang di atas daftar sebagai mempunyai alamat yang sama dengan defendan pertama, memegang 89% saham di dalam defendan pertama. Pertikaian kemudian timbul di antara pihak-pihak, dengan plaintif menyalahkan defendan pertama bagi kegagalannya membawa sokongan kewangan tetapi sebaliknya menyebabkan aliran keluar wang daripada anak syarikat Axis. Menurut plaintif projek-projek PNG tidak berjalan dan defendan pertama melalui wakil-wakilnya telah mengambil alih kawalan majoriti anak syarikat Axis tanpa mengeluarkan apa-apa wang. Plaintif memulakan guaman ini terhadap defendan-defendan apabila dia didakwa menemui bahawa defendan pertama adalah pada kesemua masa material seorang bankrap yang tidak dilepaskan (*undischarged bankrupt*). Adalah kes plaintif bahawa disebabkan oleh penemuannya ini, defendan pertama dan wakil-wakilnya tidak mempunyai apa-apa hak yang boleh dikuatkuasakan di bawah perjanjian-perjanjian yang relevan. Defendan pertama menafikan dakwaan plaintif dan menyatakan bahawa plaintif

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- A mengetahui tentang status kebangkrapan defendan pertama sebelum pihak-pihak memasuki ketiga-tiga perjanjian tersebut. Plaintiff menghujah bahawa untuk membenarkan perjanjian-perjanjian oleh defendan pertama, seorang bankrap yang tidak dilepaskan untuk diteruskan akan bermaksud menyetujui perjanjian-perjanjian yang balasannya tidak sah sebagai sesuatu
- B yang dilarang oleh Akta Kebankrapan. Plaintiff dengan itu menghujah bahawa oleh sebab perjanjian-perjanjian tersebut tidak mempunyai kebenaran awal Ketua Pengarah Insolvensi ('KPI'), ia adalah batal dan bahawa s 66 Akta Kontrak akan beraplikasi dan 'advantage' yang diterima oleh defendan pertama dan wakil-wakilnya akan dikembalikan kepada plaintiff. Dalam menjawab,
- C defendan pertama menghujah bahawa dia tidak dilantik sebagai pengarah mana-mana syarikat yang relevan, iaitu, defendan-defendan kelima, keenam dan ketujuh, dan tidak ada pemasukan atau penjalanan apa-apa perniagaan oleh defendan pertama, sama ada secara persendirian atau berkongsi. Oleh demikian, defendan pertama menghujah bahawa tidak ada keterangan mengenai apa-apa kemungkinan s 38(1)(d) dan (e) Akta Kebankrapan 1967 ('Akta tersebut').
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Diputuskan, membenarkan tuntutan plaintiff dengan kos untuk ditaksir dan dibayar oleh defendan-defendan pertama, ketiga dan keempat kepada plaintiff:

- E (1) Di atas fakta kes ini, terdapat keterangan yang mencukupi untuk membuktikan unsur-unsur pemasukan, menjalankan suatu perniagaan oleh terma-terma perjanjian yang relevan. Adalah jelas bahawa niat perundangan s 38(1)(d) Akta tersebut adalah untuk tidak membenarkan
- F apa-apa tindakan seseorang bankrap yang tidak dilepaskan berkaitan dengan memasuki atau menjalankan sesuatu perniagaan, atau berkaitan dengan secara langsung atau tidak langsung mengambil bahagian dalam pengurusan syarikat kecuali dia memperoleh kebenaran awal KPI. Alasan yang serupa sepatutnya beraplikasi berkaitan dengan kesan larangan di bawah s 38(1)(e) Akta. Oleh demikian, walaupun mahkamah ini tidak
- G bersidang sebagai mahkamah kebangkrapan tetapi diputuskan bahawa oleh sebab terdapat pelanggaran s 38(1)(d) Akta tersebut mahkamah ini tidak boleh mengendahkan kesan undang-undang ketidaksahan perjanjian-perjanjian tersebut (lihat perenggan 51).
- H (2) Sama ada plaintiff mengetahui tentang status kebangkrapan tersebut, mahkamah ini hanya boleh memutuskan atas keterangan bahawa versi plaintiff mengenai fakta tersebut adalah lebih berkemungkinan. Plaintiff dilihat sebagai lebih berterus-terang, benar dan konsisten di dalam keterangannya daripada defendan pertama, yang kelihatan lebih bersifat mengelak dan berhati-hati. Walaupun kelakuan dengan sendirinya tidak boleh menjadi panduan untuk menguji kebenaran, berdasarkan kepada keseluruhan keterangan dan dokumen-dokumen semasa yang ada, didapati bahawa plaintiff mengetahui tentang dan mengesahkan status kebangkrapan defendan pertama hanya kemudian. Oleh demikian apabila
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ketiga-tiga perjanjian dimeterai plaintif tidak diberitahu oleh defendan pertama bahawa dia adalah seorang bankrap yang tidak dilepaskan. Selanjutnya, peguamcara defendan kelima tidak mengetahui tentang status defendan pertama sehingga diberitahu pada Disember 2010, dan defendan kelima adalah alat perniagaan penting bagi defendan pertama (lihat perenggan 52–53 & 55).]

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Notes

For cases on undischarged bankrupt, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2758–2759.

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Cases referred to

Clarke v Chadburn [1985] 1 All ER 211, Ch D (refd)

Cooperative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd [1995] 3 MLJ 313; [1995] 4 CLJ 300, FC (refd)

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De Choisy v Hynes [1937] 4 All ER 54, Ch D (refd)

Kwan Chew Shen v Citibank NA [1987] CLJ (Rep) 704, HC (refd)

MBf Finance Bhd v Sykt Noma Pengangkutan Sdn Bhd & Yang Lain [1999] 4 CLJ 734, HC (refd)

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Nash v Halifax Building Society [1979] 2 All ER 19, Ch D (refd)

Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291, SC (refd)

Topps Co Inc, The v Mally Jaya Sdn Bhd [1998] 5 MLJ 744; [1998] 2 CLJ Supp 235, HC (refd)

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Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410, HC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 2, 36, 38, 38(1), 38(1)(b), (d), (e), (2), 109, 109(1)(m), (1)(m)(i)

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Companies Act 1965 ss 16, 125, 132E, 162(1), 181

Contracts Act 1950 ss 24, 24(a), (b), (e), 66

Rules of the High Court 1980 O 29 r 5

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Logan Sabapathy (Tharminder Singh, S Bhuvaneswary and Saira Baharin with him) (Izral Partnership) for the plaintiff.

Selva Balan Sinnan (Azman Joseph & Associates) for the first defendant.

Nik Syahril bin Nik Abdul Rahman (Fajrul Shihar bt Abu Samah with him) (Malaysia Department of Insolvency) for the second defendant.

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Owee Chia Ming (Owee & Ho) for the third and fourth defendants.

Ravindran Shanmuganathan (Azween with him) (Sreenevasan Young) for the fifth and sixth defendants.

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Mohamad Ariff J:

BACKGROUND FACTS

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[1] The plaintiff, Foo Fatt Chuen or 'Fudge Foo' ('Foo'), is the founder of a group of companies known as the Axis Identity Group of Companies where the holding company was initially the seventh defendant, Axis Identity Group Holdings Sdn Bhd ('AIGH'). Arising from dealings between the plaintiff and the first defendant, Jacobson Cheong ('Jacob Cheong'), the holding vehicle was transformed into the sixth defendant, Axis Identity International Sdn Bhd ('AIGI'), with the shareholding of the plaintiff reduced from a majority to a minority position. I have dealt with an aspect of the corporate restructuring in my earlier decision in D-24NCC-262 of 2010, where the transfer of shares from the plaintiff in AIGH to AIGI through a step mechanism, was held as violative of s 132E of the Companies Act and therefore void. I had then set another date for further submissions for the parties to argue on the consequential orders to follow from this decision.

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[2] The purported transfer was the 65.8% of the plaintiff's shareholding in AIGH to AIGI. After a further share swap and share issue, the plaintiff ended up owing just 20% of the shares in AIGI. The fifth defendant, Axis Global Capital Bhd ('AGC') became the majority shareholder with 57%. Another shareholder, Foo Lai Yoke ('FLY'), holds another 20%. FLY is a nominee of Jacob Cheong, and appears to be his ex wife. This is what the first defendant says in his affidavit in reply on this matter:

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As far as Madam Foo is said to be my wife, I wish to put on record that my marriage with Madam Foo ended in divorce. Madam Chan is not my present wife either. I wish to further state that Madam Chan and Madam Lai Yoke became shareholders and directors by virtue of the Memorandum of Agreement and the Supplemental Memorandum of Agreement which the Plaintiff is fully aware of and agreed to.

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[3] Madam Chan, who is referred to, is none other than the third defendant in the present proceedings, and she holds 89% of the shares in AGC. The plaintiff only holds 11 % in AGC.

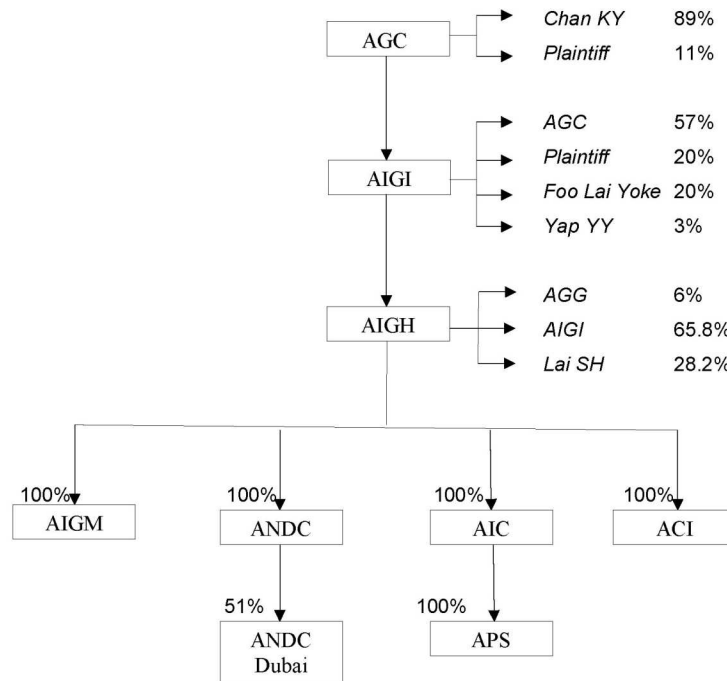
[4] Madam Lai and Madam Chan are on record as having the same address as the first defendant.

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[5] Thus in summary, the effect of the transfers and share swaps was the plaintiff held only 11 % of the shareholding in AGC; AGC holds 57% shares in AIGI; AIGI holds 65.8% of the shares in AIGH, and through AIGH controls the Axis subsidiaries.

[6] The shareholders of AIGH, after the transfers and the swaps, then consisted of AIGI as the 65.8% shareholder, AGC as 6% shareholder, and one Lai Siew Hong holding 28.2%.

[7] For clarity and ease of reference, I incorporate below the intricate corporate relationship in diagrammatic form (as usefully summarised on p 70 of core bundle A):



[8] The dealings between the plaintiff and the first defendant concern in part the development of certain pieces of land in Papua New Guinea into some large housing development projects, described variously by such colourful names as the KoKi Nest Site, Kalang Site and Chancellor Site projects. The first defendant, according to the plaintiff, was initially introduced to him in Dubai by a certain Mr Che KL, who was at the material time the Group CEO of the Axis Identity Group of Companies. The first defendant was introduced to him as a successful businessman of serious means 'who was undertaking development projects of an international flavour', and a lawyer by training. This was in 2008. Sometime towards the last quarter of 2009 Foo was again contacted by Jacob Cheong, through Che KL. This time apparently Jacob Cheong proposed a joint venture to the plaintiff on what the plaintiff has described as 'international large return projects'. According to the plaintiff's

- A nomenclature, these were ‘Jacob’s Big Deals’. The plaintiff agreed to collaborate on the joint-venture and both of them apparently identified AIGI as the joint-venture vehicle. AIGI was chosen because it was already the vehicle for the plaintiff’s foreign design business. Sometime in November 2009, to be exact 16 November 2009, Foo and Jacob Cheong entered into a
- B ‘Memorandum of Agreement’ which, inter alia, contained the following recital:
- C FFC and JC have agreed to combine the financial and business network strength of JC with established operations in system strengths of FFC in Axis Identity Group International Sdn Bhd ... a company involved in investment holding, business and activities of management consultancy (‘AIGI’) for common profit, in the manner set out below.
- D [9] It is useful to note how this first agreement defines ‘Purpose of AIGI’. The purpose is defined with reference to the ‘PNG Project’ by which there was to be a land development and the onward sale of housing units to the Housing Board Corp of Papua New Guinea.
- E [10] Prior to the signing of the memorandum of agreement dated 16 November 2009, Foo and Jacob Cheong had paid two exploratory visits to Papua New Guinea, together with Che KL. An introduction to the PNG National Housing Corp took place, and a memorandum of understanding was signed between the NHC and AIGI. The plaintiff signed on behalf of AIGI.
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- G [11] During the first exploratory meeting, the evidence disclosed the first defendant had requested that call cards be printed for him describing him as managing director of AIGI. The plaintiff apparently agreed and connived with this misrepresentation to the PNG parties.
- H [12] The first agreement was followed by a second agreement between the plaintiff and the first defendant. This second agreement specifically identified AGC as the corporate vehicle through which the first defendant’s interests were to be represented, and the resultant share structures which followed had been described earlier. This vehicle was also to be the entity to which the other big deals in PNG would be housed.
- I [13] The second agreement also referred to the land development projects which replaced the earlier projects which were earlier identified in the MOU with the PNG NHC. The first defendant had successfully negotiated with the influential Chan family of Papua New Guinea to develop three pieces of land identified as KoKi Nest, Chancellor and Kalang sites. The first defendant then assigned these agreements to AIGI.

[14] Disputes then arose between the parties because, according to the plaintiff, the first defendant had failed to bring in the necessary funding as promised, but had instead financially bled the Axis subsidiaries. It also appears that the PNG development projects did not materialise, with the result that the first defendant through his nominees had assumed majority control of AIGI, AIGH and the Axis subsidiaries without any cash outlay.

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[15] At this stage, the plaintiff then pursued the 24NCC-262 of 2010 action, which I had allowed and held the transfers of the plaintiff's majority shares in AIGH to AIGI, through the step mechanism, were void as contravening s 132E of the Companies Act 1965.

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[16] This present action is brought, according to the plaintiff, after he found out the first defendant was an undischarged bankrupt at all material times. According to the plaintiff, he came to know of the first defendant's bankruptcy status on in the course of related proceedings in OS 24-262 of 2010:

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In the course of the hearing of a related proceedings namely Kuala Lumpur High Court Originating Summons No 24-262-2010, I am advised that a statement was made by counsel on 10.12.2010 that the above named 1st defendant is an undischarged bankrupt. See paragraph 3 of the plaintiffs first affidavit.

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[17] The first defendant of course denies this allegation and maintains the plaintiff knew he was a bankrupt before the first agreement ('the memorandum of agreement') was signed. At a meeting in November 2009 at Hilton Sentral Hotel after they returned from PNG, and before they signed the first agreement, the first defendant told him of his bankruptcy status. The plaintiff, according to the defendant, told him it did not matter 'so long as there are business opportunities coming in' through his efforts. See para 49 of the first defendant's affidavit in reply, which was belatedly filed.

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THE RELIEFS PRAYED

[18] The foundation of this present suit is the alleged non-declaration of the bankruptcy status and its effects on rights flowing from the agreements entered into by the first defendant. As stated in the supporting grounds:

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(A) With the disclosure now made that the 1st Defendant is and was at all material times an undischarged bankrupt, the 1st Defendant and his nominees are not entitled to assert rights pursuant to the agreements entered into by the 1st Defendant.

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(B) Consequential orders are necessary to adjust rights consequent to the unenforceability of those agreements without prejudice to the Plaintiffs rights to commence action against the 1st Defendant, his nominees and/or agents.

A [19] The reliefs prayed for comprise the following:

- B (a) declaration that the first defendant, his nominees and/or assigns do not have any enforceable rights under and pursuant to the memorandum of agreement dated 16 November 2009 and the supplementary agreement dated 13 January 2010 entered into between the first defendant and the plaintiff or for that matter, the assignment agreement dated 13 January 2010 entered into between the first defendant and the sixth defendant;
- C (b) that the register of members of the fifth, sixth and seventh defendants be rectified to the position prior to 1 November 2009 upon such terms and conditions as this honourable court deems just;
- D (c) an injunction directed against the first, third and fourth defendants, their nominees and assigns from holding themselves out as being any part of the Axis Identity Group including and not limited to holding themselves out as officers or stakeholders of the sixth and seventh defendants and their subsidiaries;
- E (d) that leave be granted to the plaintiff to commence such action against the first, second and third defendants, their nominees or assigns as well as others as he may deem necessary to address the financial consequences, losses and other relief as the plaintiff may be advised to pursue; and
- (e) further or other relief including costs.

F [20] The dispute between the parties has turned out to be very acrimonious, with allegations and counter-allegations being leveled by one against the other. The first defendant appears to maintain a position that he has done his part in procuring the development contracts from the Chan family of PNG, and the failure of the projects to take off was due to acts of the plaintiff. The plaintiff on the other hand places the blame squarely on the first defendant for his failure to bring in the promised financial support. Instead the first defendant and his

G nominees have financially bled the Axis Group of Companies. There are allegations and counter-allegations of money laundering, and oppression. There was even on s 181 oppression petition filed by the first defendant, but this was withdrawn subsequently. According to the plaintiff, the petition was

H filed because the first defendant wanted to extract a cash payment from the plaintiff in return for an exit from the Axis Group.

THE CLINICAL APPROACH: BREACHES OF BANKRUPTCY ACT 1967, COMPANIES ACT 1965 AND CONTRACTS ACT 1950

I [21] On the initiative of the plaintiff's counsel, Mr K Sabapathy, this court was invited to treat this dispute on the basis of a 'clinical approach', meaning to simply look at the subject agreements and decide whether or not the consideration or object of these agreements is void having regard to the

governing law, in this instance principally provisions of the Bankruptcy Act 1967, Companies Act 1965, and the Contracts Act 1950. There was consensus on this. In this connection, I was invited to order an early trial under O 29 r 5 of the Rules of the High Court and to conduct the trial on the basis of the 'clinical approach'. There has been consensus on this.

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[22] The main issue in this application centred on the effects of the bankruptcy laws on these agreements, and to this extent I was of the view no prolonged cross-examination of the deponents of the affidavits was required, since the issue was one of law on the validity of the agreements. I thus directed and allowed only a limited cross-examination on the issue of knowledge of the plaintiff as to the bankruptcy status of the first defendant at the material times. This issue is of great relevance in the context of s 109(1)(m) of the Bankruptcy Act, reading:

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109 Punishment of Fraudulent Debtors

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- (1) Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made under this Act shall in each of the cases following be punished with imprisonment, which may extend to two years, or with fine or with both:

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...

(m) If being an undischarged bankrupt —

- (i) Either alone or jointly with any other person he obtains credit to the extent of one thousand ringgit or upwards, unless he proves that before obtaining the credit he informed the person giving the credit that he was an undischarged bankrupt; or
- (ii) Either alone or jointly with any other person he engages in any trade or business or enters into any contract in furtherance of any trade or business, unless he proves that before engaging in the trade or business or before entering into the contract he informed the person with whom he engages in the trade or business or with whom he entered into the contract that he was an undischarged bankrupt; ...

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[23] I will return to the evaluation of the cross-examination shortly, after considering the arguments taken by the parties.

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[24] It is to be noted that due to this limited cross-examination, the 'clinical' approach has per se to consider and evaluate the relevant evidence disclosed in the limited cross-examination too.

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THE PLAINTIFF'S ARGUMENTS

[25] The primary prayer in the originating summons is for a declaration on

A enforceability of the above mentioned three agreements dated 16 November 2009 and 13 January 2010. Reliance is made to s 38 of the Bankruptcy Act in particular, ss 16 and 125 of the Companies Act, and ss 24 and 66 of the Contracts Act.

B [26] Section 38(1)(d) and (e) are the relevant provisions, reading:

38 Consequences of refusal of discharge —

(1) Where a bankrupt has not obtained his discharge —

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...

(d) The bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, enter into or carry on any business either alone or in partnership, or become a director of any company or otherwise directly or indirectly take part in the management of any company;

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(e) The bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, engage in the management or control of any business carried on by or on behalf of, or be in the employment of, and of the following persons, namely —

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(i) His spouse;

(ii) A linear ancestor or a lineal descendant of his or a spouse of such ancestor or descendant; or

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(iii) A sibling of his or a spouse of such sibling.

...

(2) A bankrupt who makes default in performing or observing this section or a condition imposed pursuant to subsection (1A) shall be deemed guilty of a contempt of court, and shall be punished accordingly on the application of the Director General of Insolvency.

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H [27] Counsel invited the court to consider the purpose behind these provisions, and to also have regard to s 38(1)(b), which requires the bankrupt to render to the DGI every six months an account of all moneys and property which shall come to his hands for his own use during the preceding six months, and shall pay and make over to the director general of insolvency so much of the same moneys and property as have not been expended in the necessary expenses of maintenance of himself and his family.

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[28] Under s 2 of the Bankruptcy Act, 'property' is defined as including 'things in action' and 'every description of property whether real or personal' and 'every interest and profit vested arising out of or incident to property ...'

[29] Counsel links the provisions with s 24 of the Contracts Act, particularly s 24: A

The consideration or objects of an agreement is lawful, unless —

- (a) It is forbidden by a law; B
- (b) It is of such a nature that, if permitted, it would defeat any law;
- (c) It is fraudulent;
- (d) It involves or implies injury to the person or property of another; or
- (e) The court regards it as immoral, or opposed to public policy. C

[30] The argument taken is that to allow the agreements by the undischarged bankrupt to stand will be to condone agreements whose consideration is unlawful as something forbidden by the Bankruptcy Act, or is of such a nature that it would defeat the Act. D

[31] The agreements not having the prior permission of the DGI, have to be regarded as void, and as such s 66 of the Contracts Act applies to allow restoration of rights: E

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or make compensation for it, to the person from whom he received it.

[32] The 'advantage' received by the first defendant and his nominees has therefore to be restored to the plaintiff. F

[33] The common law principle that a contemnor ought not to be permitted to enjoy, or keep the fruits of his contempt, is also stressed, based on the argument that s 38(2) deems it a contempt of court for the bankrupt to commit any default under s 38(1). The English case of *Clarke v Chadburn* [1985] 1 All ER 211 is cited for the proposition that a defendant cannot be allowed to enjoy the fruits of his defiance under such circumstances: G

If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of court for doing what they did, nevertheless those acts were validly done. Of course, if an act is done, it is not undone merely by pointing out that it was done in breach of the law. If a meeting is held in breach of an injunction, it cannot be said that the meeting has not been held. But the legal consequence of what has been done in breach of the law may be plainly be very much affected by the illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them (per Megarry VC, at p 214). H I

- A [34] Based on these authorities, it was argued this court has the power to order disgorgement of the ‘fruits’ of the agreements by the first defendant and his nominees.
- B [35] This is also apart from the ability of the court to so order under s 162(1) of the Companies Act, which refers to the court’s power to order rectification of the register where the name of a person has been entered ‘without sufficient cause’.
- C [36] On the issue of knowledge and *pari delicto*, it was argued the plaintiff did not know of the first defendant’s bankruptcy status until much later. Nevertheless, counsel for the plaintiff also addresses this issue on the basis the facts here fall within one of the recognised exceptions to the *pari delicto* rule, citing, inter alia, *Nash v Halifax Building Society* [1979] 2 All ER 19, and our own Supreme Court decision in *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291:
- D ... the law on this point is as a general rule ... although no action can arise from a prohibited and illegal act, if the plaintiff can show that he is a member of a class for whose protection the statutory prohibition was imposed, then as an exception such
- E a person can enforce rights or recover property transferred under the illegal transaction.

THE DEFENDANTS’ ARGUMENTS

- F [37] The defendants took, to a large extent, a common stand. In regard to s 38(1)(d) and (e) of the Bankruptcy Act, this is how the defence is advanced based on the ‘collective skeletal submission’ of the defendants:
- G Section 38(1)(d) of the BA prohibits a bankrupt, without the previous permission of the director general of insolvency ... or the court:
- Either alone or in partnership ‘enter into any business’ or ‘carry on any business’; or
 - ‘become a director of any company’; or Otherwise ‘directly or indirectly’ take
- H part in the management of any company.
- Similarly, section 38(1)(e) of the BA prohibits the 1st Defendant, without the previous permission of the DGI or of the court:
- ‘engage in the management or control of any business carried on by or on behalf’
- I of the 1st Defendant’s spouse.

The 1st Defendant was not appointed director of any of the relevant companies, the 5th Respondent (‘AGC’), the 6th Respondent (‘AIGI’) or the 7th Respondent (‘AIGH’) ...

There is no entry or carrying on of any business by the 1st Defendant, either alone or in partnership. The companies are corporate structures. A

Shareholders do not have management rights. As such, allocation of shares to 'contractual nominees' is not relevant.

At best, by virtue of the right to nominate directors, the MOA and/or the SMOA, there is merely evidence of the 1st Defendant's opportunity to indirectly participate in the management of the companies. B

We submit that to show indirect participation of management, it is incumbent on the Plaintiff to adduce factual evidence showing that the nominee directors in fact manage the companies upon instructions of the 1st Defendant. This is essentially a question of fact ... C

However, the Plaintiff seeks to take the Clinical Approach without reference to the disputed facts.

As such, we respectfully submit that there is no evidence of any purported breach of section 38(1)(d) and (e) of the BA. D

[38] At this juncture it is necessary to add it is the first defendant who has raised the issue of *pari delicto*, by referring to the document described as 'Affidavit and Self Declaration' affirmed by the plaintiff, to be found in core bundle 'B' p 36. This peculiar document states, inter alia: E

... (1) THAT I (Foo) have entered and participated in the above dealings, projects and undertakings on my own free will, choice and purpose without reliance on any information, representation and persuasion from JC ... F

[39] This reference to the document is then extended to the argument that the plaintiff has thereby disabled himself from taking the issue under s 38 of the Bankruptcy Act. This argument is nothing short of a *pari delicto* point. As such, I directed the immediate parties, the plaintiff and the first defendant, to be cross-examined on this issue, in the course of which relevant evidence has been presented to this court. G

[40] I am therefore not persuaded that the 'clinical' approach must necessarily be regarded as a pure exercise in legal arguments on the bare agreements without any consideration of the context. Indeed, the defendants' argument on this, when pushed to its logical conclusion, will mean this: after agreeing to the clinical approach, the defendants are now saying the very same clinical approach will disallow the plaintiff to run his argument that there has been a breach of s 38. As submitted by Mr Owee, counsel for the third and fourth defendants, the facts show at best a contractual nominee ship to hold shares, but not to take part in management. The clinical approach cannot determine whether the plaintiff has taken part in management, since evidence has to be led on this. This is, with respect, a fine line-drawing exercise. H I

- A [41] The rest of the defendants' arguments relate to issues of jurisdiction and general principles on the effects of illegality in matters of contract. It is argued that the bankruptcy legislation forms a complete code, and any contempt should be contempt to be initiated by the director general of insolvency in a bankruptcy court, and cannot provide and confer a private cause of action to
- B the plaintiff.

- C [42] As for the issue of illegality, I am asked to adopt the 'more modern' approach to the issue, namely the court should be slow to strike down an act as void, since not all acts in breach of a statutory provision must necessarily be regarded as void. By the more modern approach, the defence is of course referring to the approach enunciated in, for example, the leading High Court of Australia case of *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, where Mason J, inter alia, held:

- D The principle that a contract the making of which is expressly or impliedly prohibited by statute is illegal and void is one of long standing but it has always been recognised that the principle is necessarily subject to any contrary intention manifested by the statute. It is perhaps more accurate to say that the question whether a contract is prohibited by statute is void is, like the associated question
- E whether the statute prohibits the contract, a question of statutory construction and that the principle to which I have referred does no more than enunciate the ordinary rule which will be applied when the statute is silent upon the question. Primarily, then, it is a matter of construing the statute and in construing the statute the court will have regard not only to its language, which may or may not touch upon the question, but also to the scope and purpose of the statute from which inferences may
- F be drawn as to the legislative intention regarding the extent and the effect of the prohibition which the statute contains.

- G [43] As our own Federal Court has recognised (drawing on *Yango Pastoral*), it is a matter of construction of the particular statute — a principle which is not by any means extraordinary. See *Cooperative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313; [1995] 4 CLJ 300.

- H [44] The court, it is argued, should look at the full scheme of the Bankruptcy Act, and since it provides for contracts executed by a bankrupt to enter into business with the previous permission of the director general of insolvency, s 24 of the Contracts Act should have no role to play. A bankrupt, so the argument goes, is never perse prohibited from entering into a contract.

I EVALUATION

[45] I have evaluated the arguments advanced and considered the comprehensive range of authorities cited, and I am of the view that the issue on jurisdiction is unpersuasive and not directly relevant on the facts here. It is plain

that this court is not exercising a bankruptcy jurisdiction, and is not directly concerned with an argument of contempt being committed by the bankrupt. The issue is one of illegality, and whether given the legislative framework, the relevant agreements here have become tainted with illegality and therefore void, leading to the need to have the financial benefits derived by the bankrupt, whether directly or through his nominees, disgorged.

A

B

THE LAW ON CONTRACTS ENTERED INTO BY A BANKRUPT

[46] The general rule that a bankrupt can enter into a contract is not directly relevant on the facts here. True enough in *Kwan Chew Shen v Citibank NA* [1987] 2 CLJ (Rep) 704, for instance, it was held that there appeared to be no blanket provision anywhere in the Bankruptcy Act to the effect that a bankrupt was incapable of entering into a contract. It is of significance to note the following passage by VC George J (as His Lordship then was) from the case to give the ruling its proper context:

C

D

Before concluding it is perhaps relevant to consider one other aspect of the matter based on the wide belief that once a person is adjudged bankrupt the right to enter into contracts ceases until such time as he is discharged.

This is an erroneous belief.

E

Sections 36 and 38 of the Bankruptcy Act set out the disqualifications and disabilities of a bankrupt. Inter alia, he may not hold certain offices, he may not sue without the sanction of the official assignee, he may not without the permission of the official assignee enter into or carry on any business, become a director (or take part in the management) of any company and so on. while he may not enter into a contract that would amount to his carrying on a business, it is significant that there is no blanket prohibition, express or implied, for a bankrupt to enter into a contract (at p 708 of the report).

F

[47] This general rule therefore cannot be taken as implying that the bankrupt who purports and represents to enter into a business dealing with another without disclosing his bankruptcy can shelter behind this rule. The more relevant provisions in the Bankruptcy Act, as earlier noted, are s 109 and s 38(1)(d) and (e) and s 38(2).

G

H

[48] Both sections were referred to in the High Court case of *The Topps Co Inc v Mally Jaya Sdn Bhd* [1998] 5 MLJ 744; [1998] 1 CLJ Supp 235, which was a case relating to a trade description order, but the general principles are equally applicable to his instant case. Low Hop Bing J (as His Lordship then was) held at pp 749–750 (MLJ); at p 239 (CLJ) of the report as follows:

I

In my judgment, a person who is an undischarged bankrupt at the time of affirming an affidavit must disclose his incapacity eg his status as an undischarged bankrupt to the attention of the court, especially where, as in this case, the affidavit is in support

- A of an ex parte application which is an application *uberimae fidei* ... The nondisclosure of this material fact pertaining to the deponent's capacity as an undischarged bankrupt as falling short of the standard of utmost good faith and the ex parte TDO granted pursuant thereto should, on the ground alone, be set aside ...
- B Section 38(1)(d) and s 109(m)(d) of our Bankruptcy Act 1967 ... clearly prohibit an undischarged bankrupt from otherwise directly or indirectly taking part in the management of any company. The prohibition is very wide in its scope and certainly wide enough to prohibit the deponent holding himself out in his affidavit as, a 'general manager' where the deponent was an undischarged bankrupt at the time of affirming his affidavit.
- C
- D [49] Compare *MB Finance Bhd v Sykt Noma Pengangkutan Sdn Bhd & Yang Lain* [1999] 4 CLJ 734 which seems to imply that it would be in order for a bankrupt to sign an agreement for and on behalf of a company if he is authorised by the board of directors to do so, but in this case s 109 of the Bankruptcy Act was not cited before the court.
- E [50] See also *De Choisy v Hynes* [1937] 4 All ER 54, for a common law authority which lays down a similar principle as in *The Topps Co Inc v Mally Jaya Sdn Bhd*:
- F ... where there is obtained by a person who is an undischarged bankrupt a contract by which he becomes entitled to get, from the person with whom he has entered into the contract, credit ..., without disclosing the fact that he is an undischarged bankrupt, that contract is unenforceable by the undischarged bankrupt. The undischarged bankrupt has failed to perform the duty which the section plainly imposes upon him, and, in those circumstances, it is impossible, in my opinion, for such a contract to be enforced (at pp 57–58 of the report, per Bennet J).
- G [51] On the facts of this case, there is sufficient evidence to establish elements of an entering into, or a carrying on of a business by the very terms of the relevant agreements. It is necessary to stress the width of s 38 of the Bankruptcy Act, in particular s 38(1)(d) which refers to '(d) the bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, enter into or carry on any business either alone or in partnership, or become a director of any company or otherwise directly or indirectly take part in the management of any company'. Based on the accepted principles on illegality, as noted above, it is plain the legislative intent of the Bankruptcy Act is not to condone any act of the undischarged bankrupt in relation to the entry into or the carrying on of a business, or in relation to directly or indirectly taking part in the management of a company, unless he has the prior permission of the Director General of Insolvency. To protect his creditors and the sections of public at large who may be persuaded unsuspectingly to have business dealings with him, it must surely be right for the law to regard his contracts for any of these purposes to be held void. A similar reasoning should
- H
- I

apply in relation to the effects of the prohibition in s 38(1)(e). Section 38(2) then provides for the penal consequences arising from what is deemed to be contempt of court which is punishable upon an application of the Director General of Insolvency. The existence of s 38(2) cannot, to my mind, be a sufficient reason to displace the argument that the contracts are to be held void.

A

B

ASSESSMENT OF THE CROSS-EXAMINATION

[52] As for the issue of whether the plaintiff knew of the bankruptcy status, for which the limited cross-examination was directed, I can only conclude on the evidence the plaintiff's version of the facts is more probable. I have observed the demeanour of both the plaintiff and the first defendant during the course of the cross-examination. The plaintiff strikes me as being more candid, truthful and consistent in his testimony. The first defendant, on the other hand, was evasive and somewhat guarded when questions were posed on whether he informed the parties in PNG about his bankruptcy status. From his answers, he admitted he did not inform the plaintiff he was an undischarged bankrupt throughout the time they were in PNG and meeting up with the PNG parties. The plaintiff's explanation of the events that transpired in November 2009 in Hilton Sentral is improbable. It even appears, assuming the plaintiff's version is accepted, that information on his bankruptcy status was not even volunteered by him. I quote the relevant parts of his testimony:

C

D

E

Judge: What exactly did you tell Mr. Foo when you met him at Hilton Sentral, with respect to your bankruptcy status?

D1: Upon our return from Port Moresby, Client have sent in 2 different sets of draft MOAs.

F

I'll try to explain how we had the meeting around that day. So he rang me up and we met at Hilton Sentral and so he was talking about the MOA with me. Then you know, he said he feels a little bit funny why I don't put in my name, so I say to him I'm a bankrupt. And apparently at that point in time, Che Kim Ling, his good friend for 19 years, was with him. At that time, I told them, because I can't.

G

Judge: So you didn't volunteer the information that you were a bankrupt.

D1: No ...

H

Judge: So before that, he didn't know that you were a bankrupt - when you were in PNG, he didn't know?

D1: Because when we went to PNG, nothing materialized, and it's premature, nothing concrete ...

Judge: Did anyone know you were a bankrupt?

I

D1: I'm not doing anything.

[53] Although demeanour by itself may not be a safe guide to test the truth,

- A having considered the entirety of the evidence and the available contemporaneous evidence, and the probabilities of the case, I am of the view that the plaintiff knew of and confirmed the first defendant's bankruptcy status only much later when the Director General of Insolvency wrote to confirm the first defendant was an undischarged bankrupt on 1 October 2010. It could not
- B have been sometime in November 2009, as alleged by the first defendant. Thus when the memorandum of memorandum of agreement dated 16 November 2009, the supplementary agreement dated 13 January 2010 and the assignment agreement dated 13 January 2010 were executed, the plaintiff had not been told by the first defendant that he was an undischarged bankrupt.

C

[54] It is telling in this connection to note that even a director of the fifth, sixth and seventh defendants, Mohd Raziff bin Tun Zahir, in the affidavit affirmed by him (the fifth and sixth defendant's affidavit No 1) had this to say:

D

43. ... I only came to know of Jacob's bankruptcy on or about 6.12.2009. I accordingly instructed AGC's solicitors to disclose that fact to the court when AGC's intervener application came up for hearing on 10.12.2010 in OS No. 262. (See pg. 81 of Core Bundle A).

E

[55] The first defendant's bankruptcy status thus appears to have been formally disclosed to the court only in December 2010. Even AGC's solicitors did not know of the status until informed sometime in December 2010, and AGC is an important corporate vehicle for the first defendant.

F

CONCLUSION

G

[56] Having considered the evidence, both documentary and testimonial (arising from the limited cross-examination directed), and tested the oral evidence against the documents, and applying the law to the findings of facts in this application, I am of the view there has been a breach of s 38(1)(d) of the Bankruptcy Act and s 109(1)(m)(i) of the same. Although this court is not sitting as a bankruptcy court and there has been no application by the DGI in reference to these provisions as yet, nevertheless this court cannot ignore the legal effects of illegality on the concerned agreements between the parties pursuant to s 24(a), (b) and (e) of the Contracts Act read in conjunction with s 66.

H

I

[57] On the evidence, there has been no *pari delicto* on the part of the plaintiff. I am therefore allowing the plaintiff's claim as prayed in the

originating summons, prayers (1), (2), (3) (4) and (5). Costs to be taxed to be paid by the first, third and fourth defendants to the plaintiff. **A**

Plaintiff's claim allowed with costs to be taxed and paid by the first, third and fourth defendants to plaintiff.

B

Reported by Kohila Nesan

C**D****E****F****G****H****I**